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In the Supreme Court of the United States

OCTOBER TERM, 1946

No. 1306

UNITED STATES OF AMERICA

v.

JAMES M. HEARNE

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF CLAIMS

The Acting Solicitor General, on behalf of the United States, respectfully prays that a writ of certiorari issue to review the judgment of the Court of Claims in this case.

OPINION BELOW

The opinion of the Court of Claims (R. 49–57) has not yet been officially reported.

JURISDICTION

The judgment of the Court of Claims was entered on January 6, 1947 (R. 67). On April 4, 1947, on motion of the Acting Solicitor General, the Chief Justice extended the time within which to file a petition for certiorari to May 5, 1947 (R.

105). The jurisdiction of this Court is invoked under the provisions of Section 3 (b) of the Act of February 13, 1925, as amended.

QUESTIONS PRESENTED

1. Whether overtime compensation under Section 23 of the Act of March 28, 1934, was payable, for the period here in issue, only to Government employees whose compensation was fixed by wage boards on an *hourly* or *daily* basis, or whether it was payable also to such employees whose salaries were fixed on a *monthly* or *annual* basis.

2. Whether the compensation and overtime provisions of Section 23 of the Act of March 28, 1934, with regard to Government employees whose compensation is "* * * set by wage boards or other wage-fixing authorities * * *", refer only to those Government employees whose rates of pay, in accordance with traditional and well-understood wage board procedure, are fixed with reference to prevailing rates of pay for similar work in private industry, or whether Section 23 extends to all Government employees with the exception of those covered by the Classification Act or special statutory schedules.

STATUTE INVOLVED

Section 23 of the Act of March 28, 1934, c. 102, 48 Stat. 522, 5 U. S. C. 673c, provides:

> The weekly compensation, minus any general percentage reduction which may be prescribed by Act of Congress, for the sev-

eral trades and occupations, which is set by wage boards or other wage-fixing authorities, shall be reestablished and maintained at rates not lower than necessary to restore the full weekly earnings of such employees in accordance with the full-time weekly earnings under the respective wage schedules in effect on June 1, 1932: *Provided,* That the regular hours of labor shall not be more than forty per week; and all overtime shall be compensated for at the rate of not less than time and one half.

STATEMENT

On March 14, 1940, the respondent, an employee of the Panama Canal, brought suit against the United States in the Court of Claims to recover overtime compensation under Section 23 of the Act of March 28, 1934, *supra,* for services rendered in excess of 40 hours per week from the date of enactment of the statute to the date of the commencement of suit (R. 1–2). The claim is essentially identical with that considered and upheld in *United States* v. *Townsley,* 323 U. S. 557, and with the claims urged in approximately 125 cases presently pending in the Court of Claims. In preparing and trying this case, the Government developed as complete a record as possible, with particular regard to proof of administrative practice under Section 23, for the purpose of establishing a proper basis for this request that the *Townsley* decision be reconsidered.

Beginning prior to March 28, 1934, and continuing through March 14, 1940, respondent was employed by the Panama Canal on a pipe line suction dredge in various responsible capacities at monthly rates ranging from $291 to $311 (R. 3, 5). For the period here in issue, respondent's regular workweek was, until June 30, 1939, 48 hours, composed of six 8-hour days, and thereafter 44 hours (R. 6). No overtime pay for regular services in excess of 40 hours per week was paid to respondent prior to July 1, 1941 (R. 6).[1] Respondent was accorded the compensatory time, annual leave and other privileges granted to monthly employees (R. 4–5, 6).

Since at least as early as 1929, respondent's monthly rates of pay, and those for most other floating equipment employees of the Panama Canal, have been fixed by the Governor of the Panama Canal, after recommendations of a wage board, on the basis of the rates of pay of floating equipment employees of the Army Corps of Engineers working in the continental United States,

[1] Respondent remained a floating equipment employee of the Panama Canal until October 31, 1945 (R. 3). After July 1, 1941, respondent received overtime compensation in accordance with the provisions of the various war overtime statutes applicable to monthly and annual employees of his type (R. 33–35). Act of June 3, 1941, 55 Stat. 241; Joint Resolution of December 22, 1942, 56 Stat. 1068; War Overtime Pay Act of 1943, 57 Stat. 75, 50 U. S. C. App., Supp. V, 1401. The amount of overtime compensation thus received was less than the "time and one half" rate of Section 23.

plus a 25 per cent differential for Canal service and an allowance for subsistence (R. 10).[2] This was done by fixing the rate of pay (exclusive of differential and subsistence) for the position in the Canal Zone of Master, Pipe Line Suction Dredge #86, on the basis of the rates paid in similar positions by the Corps of Engineers on floating equipment in the United States (R. 10). The rate so fixed has been used as the controlling rate from which all other positions on floating equipment operated by the Panama Canal have been coordinated by a series of differentials (R. 10).

The wage board mentioned above, created by the Governor on March 11, 1919 as an advisory group, did not fix rates of pay (R. 7–10, 10–11). It made statistical studies, analyses and recommendations, and was particularly instructed to recommend rates that would equal wage rates paid in Government service in the continental United States for similar positions, plus the 25 per cent Canal differential (R. 7, 9, 10). When there were no simi-

[2] The Act of August 24, 1912, c. 390, Section 4, 37 Stat. 561, 48 U. S. C. 1305, provides that salaries or compensation paid to Canal employees shall not exceed by more than 25 per cent the salaries or compensation paid for the same or similar services to persons employed by the Government in the continental United States. The power to appoint Canal employees and to fix their compensation granted to the President by this statute was delegated to the Governor by Executive Order No. 1888 of February 2, 1914, as amended by Executive Order No. 2514 of January 15, 1917 (R. 3–4, 57–66).

lar Government positions in the United States to serve as a basis, the board's recommendation could be based on compensation paid in non-Government positions (R. 7, 9).

The Government advanced two principal contentions in the court below: first, that Section 23 was inapplicable to Government employees, such as respondent, whose compensation was fixed on a monthly basis; and, second, that respondent's compensation was not "set by wage boards or other wage-fixing authorities" within the meaning of Section 23, since that section is limited to employees whose rates of pay are fixed with reference to prevailing rates of pay for similar work in private industry (R. 50).[3] The Court of Claims rejected the first contention on the authority of the *Townsley* case (R. 56). The second contention was rejected by statements in the opinion, contrary to the court's own findings and the uncontroverted testimony (R. 10, 38, 73–75), that the wages

[3] The Government also urged that respondent, having regularly received his fixed compensation throughout the claim period without demand or protest for a forty-hour week or for overtime compensation under Section 23, was estopped by laches (R. 56). Respondent clearly understood that his regular monthly compensation was understood and intended to be payment in full (R. 18–22, 24, 25, 26, 76, 77). His silence, and that of the other floating equipment employees, during the claim period amounted to an acquiescence whereby the Government lost its opportunity to place such employees on a forty-hour week, an action which was taken by the Governor with regard to Locks Division employees who were covered by Section 23 (R. 22–31).

of respondent and similar Canal employees were in substance fixed by reference to prevailing rates for similar positions in private employment (R. 53–55).

Judgment was entered in favor of respondent in the amount of $5,122.30 as overtime compensation for the period from March 28, 1934, through March 14, 1940 (R. 68).

SPECIFICATION OF ERRORS TO BE URGED

The Court of Claims erred:

1. In failing to hold that Section 23 of the Act of March 28, 1934, is solely applicable to Government employees whose rate of compensation is fixed at the level of the prevailing rate of pay for similar work in private industry in the locality, and that respondent's rate of compensation was not so fixed.

2. In holding that the compensation of respondent and other Government employees in similar position was set by a "wage board" within the meaning of Section 23.

3. In holding that Section 23 is applicable to Government employees paid on a monthly or annual basis.

4. In failing to hold that respondent, in regularly working more than 40 hours a week over 5 years and accepting compensation without making any claim for overtime compensation or instituting suit, is estopped by his laches.

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5. In holding that respondent was entitled to overtime compensation under Section 23 for services rendered in excess of 40 hours per week.

6. In entering judgment for respondent.

REASONS FOR GRANTING THE WRIT

As has been stated, this case has been prepared as the basis for a request that the decision of this Court in *United States* v. *Townsley,* 323 U. S. 557, be reconsidered. The question is one of importance to the Government. The companion cases now pending in the Court of Claims involve over one million dollars and, as shown by the record herein, thousands of Government employees have similar claims on which suits may be brought.

We recognize the unusual character of a request that this Court reconsider what was unquestionably a considered decision. But we are convinced that the Court fell into error in the *Townsley* case because of the inadequacy of the record there made, particularly with respect to the administrative practice under Section 23. The Government did not apply for rehearing in the *Townsley* case because the record in that case was not thought to furnish an adequate basis for seeking reconsideration. Accordingly, the Government took the unusual action of preparing this case for a second presentation; and, unlike the record in the *Townsley* case, this record contains full illumination as to the purpose and scope of Section 23 and as to

the administrative construction placed upon it by the Government agencies immediately affected by it. In our judgment it is here possible to demonstrate, far more clearly than it could be in the *Townsley* case, the correctness of the construction urged upon the Court by the Government in the latter case.

1. The major premise of the opinion of the Court in the *Townsley* case is that the Governor of the Panama Canal had been advised by the Comptroller General that Section 23 was applicable to the class of employees to which Townsley and respondent belonged (323 U. S. at 561–565) but that the Governor attempted to reduce the compensation of such employees "* * * in the teeth of the statute and the Comptroller General's ruling * * *." 323 U. S. at 562, 567. The Governor is said to have taken advantage of the Comptroller General's ruling, that monthly employees were not entitled to overtime, for the purpose of denying the statutory 40-hour week to these employees without the payment of any overtime compensation. 323 U. S. at 563.[4] The opin-

[4] In the *Townsley* case, this Court, as well as the Court of Claims, misunderstood the nature of the Comptroller General's rulings to the Governor of the Panama Canal. The Comptroller General had advised the Governor that floating equipment employees, such as respondent and Townsley, were *not* subject to Section 23 (R. 20, 57). Locks Division employees in the Canal Zone were held subject to Section 23 and the Governor had attempted to meet certain complexities, inherent in the manner in which their rates of pay were fixed, by

ion states that "* * * the administrative construction of the Governor seems to stand alone and in contradiction to that of other heads of departments and offices of the Government, and * * * worked a discrimination against the respondent and those in his class as contrasted with other employes who stood in the same relation * * *." 323 U. S. at 568. Clear evidence of Congressional understanding of Section 23 in support of the Government's construction of the statute, as shown in subsequent related legislation, was scrutinized and discounted on the basis of this understanding of the Comptroller General's rulings with regard to respondent's class of employees, the Governor's actions, and the general administrative construction of Section 23. 323 U. S. at 568–572.

We respectfully submit that the Court was in error—an error in all likelihood induced by the insufficiency of the *Townsley* record—as to the nature of the Governor's application of Section 23, and the consistent administrative practice under the statute in all departments of the Government. Believing that a full presentation and a correct understanding of these factors may con-

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transmutation of such rates of pay to an equal hourly basis (R. 23–24, 28–31, 79–83, 86–89). This transmutation was not, as this Court thought in the *Townsley* case, 323 U. S. at 562, for the purpose of defeating the rights of Locks Division employees to the benefits of Section 23 but, on the contrary, was for the purpose of ensuring that they received such benefits (R. 23–24).

vince the Court that the *Townsley* construction of Section 23 was erroneous, we urge that the question be reconsidered.

As shown by the record herein, the Governor of the Panama Canal was advised by the Comptroller General, immediately after the passage of Section 23, that the statute was *not* applicable to Panama Canal floating equipment employees, such as Townsley and the respondent herein (R. 20). Thus, far from flouting the advice of the Comptroller General, as assumed in the *Townsley* decision, the Governor was merely applying that advice in not paying overtime to respondent's class of employees under Section 23 (R. 31). Moreover, the record herein shows an overwhelmingly consistent administrative practice in support of the Government's contention that overtime compensation was not payable to monthly or annual employees under the statute, and that such employees actually worked more than 40 hours per week, both occasionally and regularly.[5] The

[5] Overtime was paid, where payable, to employees whose wages were fixed on an hourly or daily basis but was never paid to such employees whose wages were fixed on a monthly or annual basis. This basic employment policy prohibiting the payment of overtime to monthly or annual employees was embodied in the Act of March 3, 1883, 22 Stat. 531, 563, as continued by the Act of March 3, 1893, 27 Stat. 675, 715, and the Act of March 15, 1898, 30 Stat. 277, 316, 5 U. S. C. 29, and was consistently followed in practice prior to 1934 (R. 37, 39, 40). These statutes forbidding overtime compensation to monthly or annual employees were repealed by Section 604 (c) of the Federal Employees Pay Act of 1945, 59 Stat. 303.

proof in this regard covers the following agencies, the only agencies known to have employees who could possibly be considered as coming within the coverage of Section 23: Navy Department (R. 40–41); War Department (R. 41–42); Bureau of Engraving and Printing (R. 42); Government Printing Office (R. 43); Department of Agriculture (R. 43–44); Department of Commerce (R. 44–45); Department of the Interior (R. 45–46); Treasury Department (R. 46–47); Department of State (R. 47–48); National Housing Agency (R. 48); Reconstruction Finance Corporation (R. 48–49); Office of Price Administration (R. 49); Selective Service System (R. 49); and District of Columbia Government (R. 49).[6]

We respectfully submit that, in the light of this proof, great weight should be accorded to the evidence, contained in subsequent related legislation, that Congressional understanding of the scope of Section 23 supports the Government's position herein.[7] Provision for the payment of overtime compensation to monthly Navy wage board employees in Section 5 (a) of the Act of June 28, 1940, 54 Stat. 676, 678, was described by

[6] Overtime compensation was first paid to monthly and annual employees of these departments of the Government under the series of overtime statutes, where applicable, passed by Congress beginning with the Act of June 28, 1940, 54 Stat. 676 (R. 41–43).

[7] These subsequent legislative materials are set out in the Government's brief in the *Townsley* case, No. 134, October Term, 1944, at pp. 28–41.

the reporting Committees of both Houses of Congress as a departure from the practice theretofore followed, both Committees recognizing that overtime had been payable, at time and a half, to hourly and per diem wage board employees. S. Rep. 1863, 76th Cong., 3d Sess., pp. 11–12; H. Rep. 2257, 76th Cong., 3d Sess., pp. 3–4. The same understanding was expressed in providing overtime compensation for monthly wage board employees of the War Department and the Panama Canal by the Act of October 21, 1940, 54 Stat. 1205; 86 Cong. Rec. 13421; 86 Cong. Rec. 13557. The Joint Resolution of December 22, 1942, 56 Stat. 1068, specifically excluded from its scope wage board employees who were paid on an hourly or daily basis. The Joint Resolution was for the purpose of extending the expiration dates of the above described statutes which provided overtime compensation for monthly and annual employees, including wage board employees, of the War and Navy Departments, statutes which Congress did not consider as affecting wage board employees paid on an hourly or per diem basis. S. Rep. 1847, 77th Cong., 2d Sess., pp. 2–3. The same distinction was clearly made in the War Overtime Pay Act of 1943, 57 Stat. 75. See 89 Cong. Rec. 3176, 3185, 3654.[8]

[8] In all of these war overtime pay statutes, overtime compensation for monthly and annual employees was fixed by computing the daily rate as $\frac{1}{360}$ of the employee's annual pay, a formula substantially less advantageous than the true

In addition to the evidence contained in these war overtime statutes as to Congressional intent and understanding of the scope of Section 23 set forth, the Court's attention is invited to Section 102(c) of the Federal Employees Pay Act of 1945 (Act of June 30, 1945, 59 Stat. 296, 5 U. S. C. 902 (c))* which excludes from the application of the statute wage board employees generally, and to Section 203 of the statute which specifically provides: "Employees whose basic rate of compensation is fixed on an *annual or monthly basis* and adjusted from time to time in accordance with prevailing rates by *wage boards or similar administrative authority* serving the same purpose shall be entitled to overtime pay in accordance with the provisions of section 23 of the Act of March 28, 1934." [Italics supplied] (Act of June 30, 1945, 59 Stat. 297, 5 U. S. C. 913). If Section 23 had theretofore been applicable to wage board employees paid on a monthly or annual basis, there would have been no occasion for inserting in the 1945 Pay Act the specific provision making Section 23 applicable to such employees. The insertion of this

"time and one half" provided for per diem and hourly employees by Section 23. Congress nevertheless refused to place monthly and annual employees on the more liberal basis by rejecting amendments which proposed to do so. 89 Cong. Rec. 3128, 3176, 3559.

* This statute was considered by Congress and enacted subsequent to the judgment of the Court in the *Townsley* case on January 15, 1945.

provision reflects a recognition that the *Townsley* decision, in construing Section 23 as applicable to monthly employees, was contrary to the Congressional understanding of the scope of the Section.

The Congressional purpose of expanding the scope of Section 23 by this provision in the 1945 Pay Act is set forth in the report of the House Committee on the Civil Service on the bill (H. R. 3393, 79th Cong., 1st Sess.) as follows:

> SECTION 203. *Wage board employees.*—This section covers about 150,000 employees whose basic compensation is fixed and adjusted from time to time on a *per annum or monthly basis by wage boards* or similar administrative authority serving the same purpose. These *employees,* except in the Government Printing Office and the Tennessee Valley Authority, *were specifically included within the War Overtime Pay Act of 1943, because at that time they were not regarded as falling within the act of March 28, 1934,* which provides true time and one-half rates for similar employees *paid at hourly or daily rates.*
>
> Since that time, however, the Supreme Court of the United States, in *U. S.* v. *Townsley* (323 U. S. 557, Jan. 15, 1945) has decided (1) that section 23 of the act of March 28, 1934, insofar as it applies to overtime pay, covers wage-schedule employees whose base pay is fixed on a *monthly* basis; and (2) that the proper

method of computing such overtime compensation for employees paid on a monthly basis is first to multiply the monthly rate by 12 and divide the product by 260, i. e., 52 times 5. This gives the straight-time daily rate, which is multiplied by 1½ to derive the overtime rate for 1 day of 8 hours.

The committee believes it to be sound to treat the *monthly and per annum* wage-schedule employees in the same way *as per diem and hourly wage-schedule employees are treated under the act of March 28, 1934.* The fundamental criterion should be the method by which the basic rates are established, and differences in overtime pay treatment should not rest on whether such rates are administratively expressed in terms of an hour, a day, a month, or a year.

Section 203, accordingly, makes monthly and per annum wage-schedule employees, whose basic rates are established by wage boards or similar administrative authority with reference to prevailing rates, subject to the overtime pay provision of section 23 of the act of March 28, 1934, *which has always applied to similar hourly and per diem wage-schedule employees.* It also spells out the same overtime pay computation method as is approved by the Supreme Court in the Townsley case. [Italics supplied.] (House Report No. 726, 79th Cong., 1st Sess., p. 12.)

There is no question here of the desirability of a legislative policy of permitting overtime com-

pensation to monthly and annual employees of the Government. Such a policy was instituted in 1940 and has been set forth for the future in the 1945 Pay Act. But we do not believe that the policy change was made by Section 23, a statute designed to protect wage board employees against wage reductions in addition to those experienced by Government employees generally in the Economy Act era of the nineteen thirties. The contrary construction given to Section 23 in the *Townsley* case exposes the Government to a heavy financial burden, together with the loss of all opportunity to lighten the burden, which, we submit, was not intended by Congress.

2. In addition to rejecting the Government's contention that the overtime provision of Section 23 was not applicable to wage board employees on a monthly or annual basis, this Court also held in the *Townsley* case that respondent's class of employees was one whose compensation was "set by wage boards or other wage-fixing authorities" within the meaning of the statute.[10] 323 U. S. 557, 559. In so holding, the majority opinion stated its agreement with the Court of Claims on this point. The Court of Claims had resolved the question by stating, erroneously (R. 20), that the Comptroller General had held Section 23

[10] This question had not been raised by the Government either in the petition for certiorari or in presentation on the merits.

applicable to floating equipment employees of the Panama Canal.[11] 101 C. Cls. 237, 254.

We respectfully suggest that Section 23 is limited to those Government employees whose wages are fixed by reference to prevailing wages for comparable positions in private industry, and that respondent's wages were not so fixed. On the contrary, respondent's class of employees belongs in the large group of Government employees whose wages are administratively fixed but not geared to private industry rates for comparable positions. Wage board procedure, first developed in the Navy Department (Act of July 16, 1862, 12 Stat. 587, 34 U. S. C. 505), has been extended to other agencies where a need was felt directly to coordinate rates of pay at Government manufacturing plants requiring laborers and members of trades and crafts with rates paid in private industry for comparable positions in the vicinity. Traditionally, such employees have been less concerned with stability of tenure and more conscious of fluctuations in wage levels than other classes of Government employees, and have always exhibited a greater tendency to transfer from gov-

[11] In addition to his ruling to the Governor of the Panama Canal that Section 23 was not applicable to floating equipment employees, the Comptroller General has consistently ruled to the same effect in connection with floating equipment employees of other agencies. 13 C. G. 367; 13 C. G. 486; 14 C. G. 215; 14 C. G. 496; 14 C. G. 552; 20 C. G. 392; 22 C. G. 641; 22 C. G. 651; 22 C. G. 804.

ernmental to private employment. Government wage board employees have been concentrated in Navy yards, arsenals, and in the Government's printing establishments (R. 35–40).

Congress has long understood the nature and purpose of wage board procedure and the wage board employee classification. See H. Rep. 983, 63d Cong., 2d Sess; Hearings before the House Committee on Labor on H. R. 12740, 63d Cong., 2d Sess., especially p. 4; 52 Cong. Rec. 3149; H. Rep. 698, 64th Cong., 1st Sess.; H. Rep. 590, 64th Cong., 1st Sess.; 61 Cong. Rec. 2238–2239; H. Rep. 461, 67th Cong., 1st Sess., p. 2; S. Rep. 486, 67th Cong., 2d Sess., p. 9; Closing Report of the Personnel Classification Board, H. Doc. 771, 71st Cong., 3d Sess., pp. 154–155, 160, 310–317. Examination of these materials and of the administrative understanding of the nature of wage board employees both before and after the passage of Section 23 (R. 35–49), makes it clear that wage board employees were considered to be those whose wages were fixed by direct reference to private industry wages for comparable positions as a result of competition between Government and private employers for the services of the employee. The controlling relationship between the wages of such employees and private wages underlies the sponsorship of Section 23 which was designed to prevent wage boards from convening and putting into effect any reduction in the private

prevailing rates on which Government wage board employees' rates were based. By contrast, Government employees such as respondent whose wages were not fixed by reference to the private industry wage level were not so threatened by the general reduction in private wage rates. Hence the basic reason for the enactment of Section 23 had no application to them. Hearings before the Subcommittee of the Senate Committee on Appropriations, on H. R. 6663, 73rd Cong., 2d Sess., pp. 59–61.

The direct connection with private prevailing rates as the basic characteristic of wage board procedure has been recognized by all agencies employing the procedure. For example, both Navy and War Departments utilize wage board procedure for certain categories of employees but have large groups of other employees whose wages are administratively fixed without particular reference to prevailing rates in private industry (R. 35–37, 37–38, 42, 74–75, 97–98). Employees in the latter category are not and have never been considered wage board employees, whose wages are fixed by "wage board or other wage-fixing authorities," although all such employees, if Section 23 were given the literal interpretation here employed by the court below (R. 50–51, 53–55), would necessarily fall within the statute. Moreover, employees' representatives who dealt with the Governor of the Panama Canal immediately after the passage of Section 23 as to its applicability to Canal

Zone employees, recognized that wage board employees were those whose rates were fixed by reference to prevailing rates for comparable positions in private industry and that Canal employees whose rates were otherwise fixed were not covered by the statute (R. 21–22, 77–78, 83–84). Finally, Congress, in the overtime legislation described above (*supra*, pp. 12–15), has continuously recognized wage board employees as those Government employees whose wages are linked to and based upon prevailing rates of pay in private employment, and that the wage board category does not extend to all ungraded employees whose wages are administratively fixed. These statutes consistently describe wage board employees as "those whose wages are fixed * * * and adjusted from time to time in accordance with prevailing rates by wage boards or similar administrative authority serving the same purpose." See, e. g., Joint Resolution of Dec. 22, 1942, 56 Stat. 1068; War Overtime Pay Act of 1943, 57 Stat. 75, 76.

Here, respondent's rates of pay were not fixed by reference to comparable prevailing rates in private industry, but were derived from rates of pay for floating equipment employees in the Army Corps of Engineers, which rates in turn were not fixed by wage board procedure.[12] Accordingly,

[12] The court below found that the rates of pay of Corps of Engineers employees, who were not under the Classification Act or whose rates of pay were not otherwise fixed by

we submit that respondent's compensation was not fixed by "* * * wage boards or other wage-fixing authorities * * *" within the meaning of Section 23.

CONCLUSION

For the reasons stated, it is respectfully submitted that this petition should be granted.

GEORGE T. WASHINGTON,
Acting Solicitor General.

MAY 1947.

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statute, were not fixed under a wage board procedure but were fixed administratively, with a tendency to fix nationwide rates (R. 38). The court below also found that, in fixing such rates, the prevailing level of wages paid by private industry was not the primary consideration (R. 38). The uncontroverted testimony of the Staff Assistant, Civilian Personnel Division, Office of the Secretary of War, is to the same effect (R. 73–75). This testimony also shows that rates paid to such ungraded employees were closely compared with comparable rates provided by the Classification Act (R. 75).

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MISCELLANEOUS:

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IN THE

Supreme Court of the United States

OCTOBER TERM 1946.

No. 1306.

UNITED STATES OF AMERICA

v.

JAMES M. HEARNE.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF CLAIMS.

Respondent respectfully prays that the petition for a writ of certiorari to review the judgment of the Court of Claims in this case be denied.

Opinion Below.

The opinion of the Court of Claims (R. 49-57) has not yet been officially reported.

Jurisdiction.

The judgment of the Court of Claims was entered on January 6, 1947 (R. 67). On April 4, 1947, on motion of the Acting Solicitor General, the Chief Justice extended the

time within which to file a petition for certiorari to May 5, 1947 (R. 105). The jurisdiction of this Court is invoked under the provisions of Section 3 (b) of the Act of February 13, 1925, as amended.

Questions Presented.

1. Whether overtime compensation under Section 23 of the Act of March 28, 1934, was payable for the period here in issue, to respondent, an employee of the Panama Canal on floating equipment, whose compensation was fixed on a *monthly* basis pursuant to a recommendation by a wage board.

2. Whether respondent's compensation was "* * * set by wage boards or other wage-fixing authorities * * *" within the meaning of Section 23 of the Act of March 28, 1934.[1]

Statute Involved.

Section 23 of the Act of March 28, 1934, c. 102, 48 Stat. 522, 5 U. S. C. 673c, provides:

> The weekly compensation, minus any general percentage reduction which may be prescribed by Act of Congress, for the several trades and occupations, which is set by wage boards or other wage-fixing authorities, shall be reestablished and maintained at rates not lower than necessary to restore the full weekly earnings of such employees in accordance with the full-time weekly earnings under the respective wage schedules in effect on June 1, 1932: *Provided*, That the regular hours of labor shall not be more than forty per week; and all overtime shall be compensated for at the rate of not less than time and one-half.

[1] Petitioner states too broadly the second question presented. The Court below did not hold that Section 23 applied to all Government employees except those covered by the Classification Act or special statutory schedules.

STATEMENT.

On March 14, 1940, the respondent, an employee of the Panama Canal, brought suit against the United States in the Court of Claims to recover overtime compensation under Section 23 of the Act of March 28, 1934, *supra*, for work performed by him in excess of 40 hours per week from the date of enactment of the statute to the date of the filing of his suit (R. 1-2). The claim involves substantially the same facts, and the identical legal issues as were presented in *United States* v. *Townsley*, 323 U. S. 557.

Since March 28, 1934, and until March 14, 1940, the respondent was employed by the Panama Canal on a pipe line suction dredge, in various capacities, at monthly rates of pay ranging from $291 to $311 (R. 3, 5). During this period respondent's regular work week was 48 hours, composed of six 8-hour days, until June 30, 1939, when it was reduced to 44 hours per week (R. 6).

Since at least 1929, respondent's monthly rates of pay, and those of most other employees on floating equipment in the Panama Canal, have been fixed by the Governor, after recommendations of a wage board, on the basis of the rates of pay of floating equipment employees of the Engineer Corps of the United States Army working in the continental United States, plus the usual 25 per cent differential for Canal Service and an allowance for subsistence (R. 10). The wage rates for floating equipment employees paid by the Engineer Corps were in turn based upon rates prevailing in private industry for similar work. (Finding 9, R. 10 and Finding 29, R. 27-28.)

The wage board of the Panama Canal was created by the Governor on March 11, 1919 (R. 7). Like the other Federal wage boards, it does not fix rates but recommends or proposes rates. (R. 7, 9, 10, 11, 35-38, 39, 40)

The petitioner advanced three principal contentions in the court below: first, that section 23 was not applicable to respondent, whose compensation is fixed on a monthly basis; second, that respondent's compensation was not

"set by wage boards or other wage-fixing authorities" within the meaning of Section 23; and third, that respondents claim was barred by laches. The Court of Claims rejected all of these contentions and entered judgment for respondent (R. 49-57, R. 67).

Reasons for Denying Writ.

1. The question whether monthly employees on floating equipment of the Panama Canal whose compensation is set by "wage boards or other wage-fixing authorities" are entitled to overtime pay under Section 23 has already been decided by this Court in *United States* v. *Townsley*, 323 U. S. 557. In so far as pertinent the facts in the present case and the Townsley case are identical. No valid reason for reconsidering this question has been advanced by petitioner in the present case.

Petitioner's principal reason for requesting reconsideration of this question is, it asserts, that this Court in the *Townsley* case, mistakenly understood (1) that the Governor of the Panama Canal attempted to reduce the compensation of monthly floating equipment employees of the Dredging Division, such as Townsley and respondent despite the Comptroller General's ruling that this was prohibited by Section 23; (2) that the Governor, relying on the Comptroller General's ruling that monthly employees could not be paid overtime, regularly worked the floating equipment employees more than 40 hours per week despite the Comptroller General's ruling to the contrary; and (3) that the administrative construction by the Governor was in contradistinction to that of other departments and agencies of the Government.

It is true that the Comptroller General's first ruling to the Governor held that Section 23 did not apply to floating equipment employees of the Panama Canal and that it was speaking of the monthly employees of an entirely different division of the Panama Canal, i.e., the Locks Division, when it held that Section 23 prohibited reduction of their com-

pensation, limited their regular workweek to 40 hours, but that they should not be paid overtime (R. 19, 20). Thus the Governor did not disregard this ruling when he continued to work floating equipment employees overtime, and ignored it only in the case of certain Locks Division employees whom he placed on a 40-hour week, but whose monthly rates of pay he converted to hourly rates which yielded them less weekly compensation for the 40-hour week than they had previously received for the 48 hours which they had worked when on a monthly basis (R. 22, 23, 24). Following the Comptroller General's second ruling, the Governor reconverted the hourly rate of the Locks Division employees to their original monthly rate and reduced their workweek to 40 hours (R. 30-31). This was in accordance with the general practice of other "wage boards or wage-fixing authorities" of following the rulings of the Comptroller General which prohibited a regular workweek of more than 40 hours for monthly or annual wage board employees but which held that such employees should not be paid overtime (R. 40, 41, 42, 43; see also 13 Comp. Gen. 265, 269; 13 id. 277, 278; 13 id. 307).[2]

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[2] Petitioner asserts that the overwhelming administrative practice, under Section 23, shows that monthly and annual employees actually worked more than 40 hours per week, both occasionally and regularly, and cites pages 40 to 49 of the record in support of this assertion. An examination of the record shows that in those cases where the administrator was assisted by a wage board the general rule, up to the time at least of the war emergency, was to follow the rulings of the Comptroller General that monthly or annual wage board employees should not regularly be worked more than 40 hours per week, and should not be paid overtime. (See R. 30-31 as to the Panama Canal; R. 40-41, as to the Navy Yards; R. 41-42, as to the War Department, R. 43, as to the Government Printing Office.) The balance of the record relied upon by petitioner merely shows that there were in some departments, some employees whose wages were fixed administratively, and who were worked overtime, either occasionally or regularly more than 40 hours per week, without receiving overtime pay. The reason for doing so is not revealed. Such action may have been based upon a ruling of the Comptroller General that Section 23 did not apply to any employees unless a wage-board procedure had been formal-

Respondent submits that any misunderstanding upon the part of this Court concerning the Governor's application of the Comptroller General's ruling to such floating equipment employees has no bearing whatsoever on the question whether monthly employees whose compensation is set by "wage boards or other wage-fixing authorities" are entitled to overtime compensation under Section 23. From a reading of this Court's opinion in the *Townsley* case there can be no doubt but that the Court understood that the general practice among the other "wage boards or wage-fixing authorities" was to follow the rulings of the Comptroller General prohibiting the regular workweek of their monthly or annual employees to exceed 40 hours, prohibiting the reduction of their compensation, but refusing to permit payment to them of overtime compensation. 323 U. S. at pp. 567-568. As shown in the preceding paragraph of this brief, the Court's understanding of the general practice of such other agencies was correct. However, with knowledge of this general practice—an impossible construction which applied to such monthly wage-board employees all of the provisions of Section 23 except that relating to the payment of overtime—this Court held that under Section 23 these monthly wage-board employees were entitled to the payment of overtime. It is not seen therefore, that the fact that one more agency, i.e., the Panama

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ized to a considerable degree, 14 Comp. Gen. 215, 217; or upon a ruling that excluded the application of Section 23 to employees who were not within the "several trades and occupations" within the meaning of Section 23, 14 Comp. Gen. 42. Further, many of the employees referred to by petitioner were paid by administrative adoption of the Classification Pay Act Schedules and it is possible for that reason that they were not regarded as being covered by Section 23. (See 25 Comp. Gen. 41). In any event, there is nothing in the record to show that any of the administrators who worked their employees more than 40 hours a week without paying overtime did so because they interpreted Section 23 as not applying to monthly or annual wage board employees. Certainly the record fails to show an "overwhelmingly consistent administrative practice" to regularly work monthly or annual wage board employees more than forty hours per week without overtime pay.

Canal, followed the rulings of the Comptroller General is any reason for reconsidering the question whether monthly employees whose compensation is set by "wage boards or other wage-fixing authorities" are entitled to overtime compensation under Section 23.

It is significant that the Government, despite full knowledge that this Court did not correctly understand the Governor's application of the rulings of the Comptroller General,[3] did not request a rehearing in the *Townsley* case.

Petitioner repeats the argument it advanced in the *Townsley* case that subsequent legislation shows that Congress did not intend to apply Section 23 to such monthly wage-board employees. The legislative materials upon which petitioner relies were, with the exception of the Federal Employees Pay Act of 1945 (Act of June 30, 1945, c. 212, 59 Stat. 295) set out exhaustively in the Government's brief in the *Townsley* case (No. 134, October Term 1944, at pp. 28-41). They were considered by this Court and rejected as a ground for holding that Section 23 did not apply to these monthly employees. 323 U. S. at pp. 570-573. It is not seen, therefore, that any reason exists for reconsidering such legislative materials.

As to the Federal Employees Pay Act of 1945, *supra*, petitioner contends that there was no reason to enact Section 203, prescribing for monthly and annual wage-board employees the same formula for overtime as laid down by this Court in the *Townsley* case,[4] if such employees had

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[3] In a footnote to its brief in this Court in the *Townsley* case (No. 134, October Term, 1944, at page 8) the Government stated:

> "* * * The Comptroller General also ruled that Section 23 was not applicable in any respect to employees of the Panama Canal 'on floating equipment' because their wages were not fixed through wage board procedure. 14 Comp. Gen. 156, 158."

[4] Section 203 of the Federal Employees Pay Act of 1945 provides:

> "Sec. 203. Employees whose basic rate of compensation is fixed on an annual or monthly basis and adjusted from time

previously been entitled to overtime under Section 23 of the Act of 1934, since Section 102(c) of the Federal Employees Pay Act of 1945 already excludes wage-board employees generally from the application of the 1945 act. However, the legislative history of this Act clearly shows that Section 203 was adopted not because it was thought that Section 23 of the 1934 Act did not entitle these employees to overtime but merely out of an abundance of caution. Mr. Kushnick of the War Department, appearing at the hearings before the Committee on Civil Service, House of Representatives, was the one who suggested that provision be made for monthly and annual wage-board employees. In this connection, he stated:

> "The Department also recommends that the overtime provisions of the two bills be amended to include those wage-board employees whose wages are fixed on an annual basis. This can be accomplished by adopting the language of Public Law 49 for inclusion in section 101 of this bill and by inserting in section 102 (d) language which would restrict its exemption to daily and hourly employees. It may be true that under present court decisions per annum wage-board employees are entitled to overtime under another law. However, in

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to time in accordance with prevailing rates by wage boards or similar administrative authority serving the same purpose shall be entitled to overtime pay in accordance with the provisions of section 23 of the Act of March 28, 1934 (U. S. C., 1940 edition, title 5, sec. 673c). The rate of compensation for each hour of overtime employment of any such employee shall be computed as follows:

(a) If the basic rate of compensation of the employee is fixed on an annual basis, divide such basic rate of compensation by two thousand and eighty and multiply the quotient by one and one-half; and

(b) If the basic rate of compensation of the employee is fixed on a monthly basis, multiply such basic rate of compensation by twelve to derive a basic annual rate of compensation, divide such basic annual rate of compensation by two thousand and eighty, and multiply the quotient by one and one-half." (59 Stat. 297)

view of the possibility of further litigation on this point, we should like very much to play safe, with an assurance that these employees are definitely covered by existing legislation. * * *'' (Hearings on H.R. 2497 and H.R. 2703, 79th Cong., 1st Sess., page 100)

Petitioner also asserts that the committee report on the 1945 Pay Act, quoted at pages 15-16 of the petition, indicates a Congressional purpose of expanding the scope of Section 23 to include monthly and annual wage-board employees. While this report states that at the time of the 1943 War Overtime Pay Act such employees were not regarded as falling within Section 23 of the Act of March 28, 1934,[5] it then refers to this Court's decision in the *Townsley* case and states that it believes it to be sound to treat all wage-board employees alike. Respondent submits, by the same token, it is equally sound to treat all wage-board employees alike under Section 23, the terms of which are equally applicable to annual, monthly, daily or hourly employees. However Section 23 may have been regarded at the time the War Overtime Pay Act of 1943 was enacted, it

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[5] As shown *supra* the Comptroller General had consistently ruled that monthly wage board employees were entitled to all of the benefits of Section 23 except the payment of overtime (13 Comp. Gen. 265, 269, 13 Comp. Gen. 277, 13 Comp. Gen. 307, 14 Comp. Gen. 156). Moreover, it is by no means clear that Congress at the time of the enactment of the 1943 War Overtime Pay Act believed that monthly wage board employees were not covered by Section 23. This is shown from the testimony of Mr. McReynolds, Administrative Assistant to the President, in the hearings before the Subcommittee of the Committee on Civil Service, United States Senate, shortly before the enactment of the War Overtime Pay Act of 1943 (Act of May 7, 1943, c. 93, 57 Stat. 75):

"Mr. McReynolds. The main wage board groups are covered by legislation—permanent legislation.

Senator Mead. That is right.

Mr. McReynolds. Governed by the practice in industry, whatever that is.

Senator George. Are those employees employed on a monthly basis?

Mr. McReynolds. Hourly, daily and monthly."

(Hearings on S. 635, 78th Cong., 1st Sess., p. 6)

is obvious from this report and from Section 203 of the Federal Employees Pay Act of 1945 that Congress now approves this Court's interpretation of Section 23 in the *Townsley* case. Respondent, therefore, submits that there is nothing in the legislative history of the 1945 Federal Employees Pay Act which would justify a reconsideration of the question whether Section 23 of the Act of March 28, 1934, applies to monthly wage-board employees on floating equipment of the Panama Canal.

2. No valid reason exists why this Court should reconsider the question whether the compensation of Panama Canal floating equipment employees, such as Townsley and respondent, was set by "wage boards or other wage-fixing authorities" within the meaning of Section 23. In the *Townsley* case the Government asserted in the Court of Claims that the compensation of such employees was not based upon rates prevailing in private industry, and that it was not, therefore, set by "wage boards or other wage-fixing authorities" within the meaning of Section 23 (pages 58-62 of the record in C. Cls. No. 45097). The Court of Claims rejected this contention in *Townsley* v. *United States*, 101 C. Cls. 237, 254, and in so doing, mistakenly asserted that the Comptroller General had held Section 23 applicable to floating equipment employees of the Panama Canal. With full knowledge of this error,[6] the Government, before this Court, abandoned its contention that the compensation of Panama Canal floating equipment employees was not fixed by "wage boards or other wage-fixing authorities" within the meaning of Section 23. See *United States* v. *Townsley*, 323 U. S. 557, 559. This Court then held that the compensation of such employees was set by "wage boards or other wage-fixing authorities." This Court's opinion in the *Townsley* case indicates that it also understood that the Comptroller General ruled that Section 23 was applicable to such employees. Although the Government had full knowledge of this misunderstanding it did

[6] See footnote 3, *supra* p. 7.

not think it of sufficient importance to request a rehearing. Coupling this with the fact that petitioner attached so little importance to the misunderstanding of the Court of Claims in this connection that it made only passing reference to it in a footnote to its brief in this Court in the *Townsley* case, it is obvious that this point does not possess that importance which petitioner now seeks to attach to it. Petitioner's assertion that it did not apply for rehearing in the *Townsley* case because it thought the record was inadequate cannot be reconciled with the fact that the Government, and not *Townsley,* applied for and obtained certiorari in that case.

It should be here pointed out that the Comptroller General's ruling that Section 23 was not applicable to floating equipment employees of the Panama Canal, is not entitled to any weight whatever in construing Section 23 since it was based upon his mistaken understanding that the rates of floating equipment employees, like those of policemen and firemen, were fixed by or pursuant to statute (R. 19-20). As to policemen and firemen of the Panama Canal, the Comptroller General's understanding was correct, their compensation being based upon the statutory rates for policemen and firemen in the District of Columbia (R. 21, 91; see also 25 Comp. Gen. 41). As to floating equipment employees of the Panama Canal his understanding was decidedly incorrect, their rates being fixed upon the recommendation of the wage board. As previously pointed out the wage board recommendations were based on the rates of floating equipment employees of the United States Engineers, whose rates in turn were based on those prevailing in private industry (Finding 9, R. 10, Finding 29, R. 27-28). However, despite the fact that the Governor knew that the Comptroller General misunderstood the facts upon which he based his ruling concerning floating equipment employees of the Panama Canal, and despite the fact that the employees' representatives pointed out to the Governor that the Comptroller General's ruling was based upon a

misunderstanding and requested that the correct facts be submitted by him to the Comptroller General, the Governor never saw fit to do so (R. 21-22, 25, 83-84, 91).

In the present case petitioner again advances the contention that the compensation of Panama Canal employees on floating equipment was not set by "wage boards or other wage-fixing authorities" within the meaning of Section 23. The point is not valid.

Senator Thomas, the author of Section 23, stated on the floor of the Senate that the purpose of Section 23 was to help employees "in the navy yards, the arsenals, the Panama Canal Zone, the Government Printing Office, and the Bureau of Engraving and Printing" (78 Cong. Rec. 2977). The compensation of floating equipment employees of the Panama Canal, who have been denied the benefits of Section 23, as well as the compensation of employees of the Locks Division of the Panama Canal, to whom Section 23 has been applied, both are fixed by the Governor upon the recommendation of the same wage board. (R. 7-18, 19, 31). Section 23 has been applied to employees in the Navy Yards, Arsenals, and the Government Printing Office, who likewise have their compensation set by administrative officers upon the recommendation of wage boards (R. 10-11, 35-40, 40-43).

Petitioner, however, while not questioning the propriety of applying Section 23 to employees of the Locks Division, now insists that Section 23 does not apply to employees on floating equipment, even though the compensation of both is fixed by the Governor upon recommendation of the same wage board. There is nothing in the language of Section 23 or in its legislative history from which can be inferred any such Congressional intent or which justifies such an extraordinary interpretation.

It is petitioner's contention that wage-board employees are those whose wages are fixed by direct reference to private industry wages for comparable positions and that respondent's wages were not so fixed. However, an analysis of the application of Section 23 reveals that no such

inflexible rule exists. For example, Section 23 has been applied to certain per diem employees of the District of Columbia, whose rates are fixed after a study of rates paid by certain Government agencies, including the *U. S. Engineer Office,* and by certain private utilities, and whose rates are checked to make certain they do not exceed employees paid under the Classification Act[7] (R. 40, 49, 99-100). Section 23 has also been applied to Navy Yard employees although wage boards were abandoned in the Navy Yards from 1929 to 1940 (R. 37, 40-41, 95-97). It was applied to Locks Division employees of the Panama Canal whose rates were based upon rates paid in Navy Yards in the continental United States (R. 19-20, 23, 28-31, 84-90). Section 23 was also applied to certain truckdrivers of the Panama Canal whose hourly rates were derived from a combination of annual salaries paid by the Post Office Department and hourly rates of the Navy Yards, 14 Comp. Gen. 594.

From the above it is clear that there is in reality no inflexible wage board practice of fixing wage rates by direct reference to rates in private industry as petitioner asserts. Moreover, the record shows that the rates of floating equipment employees of the Panama Canal were, in the last analysis, based upon private rates. It shows that the majority of the rates paid to such employees, including respondent, were based upon rates paid to floating equipment employees of the United States Engineers (Fdg. 9, R. 10), and that the rates of such employees of the United States Engineers were based in turn upon those paid to similar employees in private industry in the vicinity (Fdg. 9, R. 10; Fdg. 29, R. 27-28). Respondent's witness Mangan testified that the local prevailing rate was not the

[7] It is interesting to note that at pages 21-22 of its petition the Government contends that Section 23 should not be applied to respondent because his rates were based upon rates paid by the United States Engineers and because, it asserts, the rates paid to such employees of the United States Engineers were closely compared with comparable rates provided by the Classification Act.

primary consideration in fixing rates for United States Engineer employees, that there was a "tendency" towards a nation-wide rate, and that local rates were compared to the closest rates in the Classification Act. However, he admitted that the method of fixing rates for the United States Engineers is described in the submission made by the Secretary of War to the Comptroller General in 1934 (R. 73-75). This submission is set out in Finding 29 (R. 27-28) and shows that the rates of such employees were fixed by the District Engineers or by the Chief of Engineers and the Secretary of War in accordance with the following principles: (1) Each employee must receive a living wage; (2) the rates, in recognition of the law of supply and demand, must be high enough to attract the numbers and kinds of employees needed; and (3) the rates must be in line with those paid similar employees in similar positions and trades in the vicinity, it being improper to pay materially more or materially less.

As stated by the Court below, it is difficult to think of a more accurate way of saying that compensation shall be fixed by the administrator on the basis of comparable commercial rates.

In summary, then, it is clear that the application of Section 23 to employees of the various departments and agencies has not involved any rigid principle that the compensation of such employees must be based directly upon prevailing commercial rates. The rates of floating equipment employees of the Panama Canal, such as respondent and Townsley, were based upon rates paid by the United States Engineers, which in turn were based directly upon those prevailing in the locality. Thus, respondent's rates were, in the last analysis, based upon prevailing commercial rates, which cannot be said of the compensation of many employees to whom Section 23 has been applied. It is therefore, clear that respondent's compensation, which was fixed by the Governor upon recommendation of the Wage Board, was set by "wage boards or other wage-fixing au

thorities" within the meaning of Section 23, and there is no reason why this Court should reconsider this point.

3. The question whether or not respondent is estopped by laches was correctly decided by the Court below, and moreover, is not of sufficient importance to justify extended consideration by this Court. In a footnote to page 6 of its petition, petitioner states that respondent regularly received his fixed compensation throughout the claim period without demand or protest for a 40-hour week or for overtime under Section 23, and with the understanding that his regular monthly compensation was understood and intended to be payment in full. This, petitioner states, amounted to an acquiesence whereby the Government lost its opportunity to place respondent and similar employees on a 40-hour week as was done by the Government in the case of the Locks Division employees. This point is without merit. As appears from the findings of the Court below (Finding 20, R. 21); Finding 23, R. 25; Finding 24, R. 25, R. 76, 77-78, 83-84) the employees' representatives did raise questions as to the rights of respondent and other floating equipment employees which gave the Governor a full and early opportunity to study the problem and to make up his mind whether Section 23 applied to such employees. The Court below (R. 56-57) emphasized the administrative confusion that existed in the various rulings applicable to such floating equipment employees and concluded that it would be unfair to impose the bar of laches under such circumstances, and that respondent's conduct had not been so inconsiderate of the rights of the Government as to forfeit the right given to him by Section 23. Moreover, one of the essential elements of estoppel is that the action or inaction of one party must have caused the other to act to his detriment. Although the Governor was produced as a witness in this case there is not one word of testimony in the record that he would have placed the floating equipment employees on a 40-hour week or that he would have acted in anyway different from his actual conduct in this case had he known that this Court would hold that under Section 23 such em-

ployees should not be worked more than 40 hours per week without the payment of overtime. That petitioner attaches little if any importance to this point is shown by the fact that although it raises the question of laches, in its Specification of Errors it does not urge it as one of the reasons for granting the writ.

4. The questions involved are not of the monetary importance suggested by the petitioner, nor does there exist the number of potential claims which the petitioner would have the Court believe. The amount involved in companion cases pending in the Court of Claims is substantially less than the $1,000,000 stated by petitioner, and the thousands of similar claims which petitioner asserts exist, apparently exist only in its imagination. Similar assertion was made by the Government in its petition for a writ of certiorari in the *Townsley case* (No. 134, October Term, 1944, pp. 19-20 of the Petition). Almost two and one-half years have elapsed since the rendition of this Court's decision in that case, yet no new cases have been filed. The Act of March 28, 1934, is now more than 13 years old, and even if petitioners assertion with respect to the number of potential claims that might arise under the Act were correct, it is obvious that practically all such claims would now be barred by the six-year statute of limitations.

CONCLUSION.

For the reasons stated, it is respectfully submitted that this petition should be denied.

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